United Nations A/C.6/59/SR.20

General Assembly
Fifty-ninth session

Official Records

Distr.: General
9 November 2004

Original: English

Sixth Committee

Summary record of the 20th meeting
Held at Headquarters, New York, on Wednesday, 3 November 2004, at 2.30 p.m.

Chairman:	Mr. Bennouna	(Morocco)
later:	Mr. Simon (Vice-Chairman)	(Hungary)
later:	Mr. Bennouna (Chairman)	(Morocco)

Contents

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*)

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The meeting was called to order at 2.45 p.m.

Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Mr. Henczel** (Poland) congratulated the Commission on completing the first reading of the draft articles on diplomatic protection and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities and said that the importance of the two topics for contemporary international law could not be overestimated.

2. During the second reading of the draft articles on diplomatic protection, his delegation would like the Commission to revisit some of the provisions originally proposed by the Special Rapporteur but not adopted on first reading. It should consider whether the clean hands doctrine was relevant to the topic and should be reflected in an article. In addition, some of the detailed provisions dealing with the protection exercised by international organizations or with diplomatic protection exercised against or in conjunction with international organizations should be reconsidered for inclusion. Although it was true that the right of functional protection exercised by international organizations was derivative in nature, that did not rule out the possibility of a parallel entitlement of a State and an international organization to exercise international protection in respect of the same person. The situation could be even more complicated: the organization might wish to exercise its functional protection in respect of its agent against the State of his or her nationality. Although the question of the priority of such rights and competing claims was still unresolved in existing law and practice, it was appropriate that even that uncertainty should be reflected to some extent in the draft articles.

3. With regard to the complex topic of international liability for injurious consequences arising out of acts not prohibited by international law, which had been on the agenda for a quarter of a century, the narrower, step-by-step approach of dividing the topic into the prevention and liability aspects had finally allowed the Commission to make significant progress. However, the draft principles adopted on first reading on the allocation of loss in the case of transboundary harm arising out of hazardous activities could stand to be expanded on second reading. It would be worthwhile to revisit some of the principles proposed by the Special Rapporteur in his second report, such as those dealing with the relationship with other rules of international law and with the settlement of disputes. The statement of the objective of the draft principles was overly condensed, jumbling together natural and legal persons and States as possible victims and mixing damage to the environment with other kinds of transboundary damage. With regard to the final form the text should take, his delegation thought that, despite their current formal differences, it would be possible and useful to combine the draft articles on prevention and the draft principles on allocation of loss into one instrument, preferably a convention, on international liability.

4. His delegation reserved the right to prepare and present more detailed comments on the draft documents on diplomatic protection and international liability during the coming year. With regard to the future work of the Commission, his delegation considered the two new topics proposed, "Expulsion of aliens" and "Effects of armed conflicts on treaties", to be suitable for codification and progressive development by the Commission. It also fully supported inclusion of the topic "Obligation to prosecute or extradite (*aut dedere aut judicare*)" in the Commission's long-term programme of work, in view of the timeliness of the topic with respect to international crime, including terrorism.

5. **Mr. Medrek** (Morocco) said that his delegation welcomed the adoption on first reading of the draft articles on diplomatic protection and the draft principles on international liability and was pleased at the progress made on reservations to treaties, responsibility of international organizations and shared natural resources. It thought that the new topics, "Expulsion of aliens" and "Effects of armed conflicts on treaties", were feasible, but that the Commission would have to establish priorities among the topics in its programme of work.

6. As the Commission had asked, Morocco would present written comments on the draft articles on diplomatic protection as a contribution to the second reading. His delegation's first impression was that the 19 draft articles were balanced and reflected customary law in one of the oldest areas of international law. It approved of the Commission's decision to opt for the traditional concept of diplomatic protection as a right of the State to be exercised at its discretion. Multiple nationality, dealt with in draft article 6, was a fact of

international life, but the Commission, during the second reading, should consider the question of competition among several countries claiming the exclusive right to protect one and the same person and how such a dispute could be resolved. The Commission had rejected the need for an effective link requirement with regard to nationality and thought that there was no reason why States of nationality might not jointly exercise a right attaching to each. However, what sounded simple in principle might prove to be difficult in practice. Draft article 7, which appeared to embody the principle of dominant nationality, was problematic. To speak of predominant nationality called into question the principle of the sovereign equality of States, especially since the Commission offered no criterion for determining predominance. Draft article 8 on the exercise of diplomatic protection in respect of stateless persons and refugees represented progressive development of law, since it departed from the traditional concept that a State might exercise diplomatic protection only with respect to one of its nationals. His delegation considered the solution appropriate, because it was in favour of protecting such persons with provisional status.

7. With regard to protection of shareholders of a corporation, the Commission should reconsider draft articles 12 and 13 to take into account the volatility of the status of shareholder in the modern international economy. His delegation questioned the exception stated in article 11, subparagraph (b), and felt that the Commission should not have derived a general rule from the conclusions of the International Court of Justice in the *Elettronica Sicula S.p.A. (ELSI)* case, which concerned a relationship between two States based on a treaty.

8. On the very important question of exhaustion of local remedies, his delegation found draft article 14 to be sound, since it codified the recognized rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. Of the exceptions to the rule set forth in draft article 16, his delegation supported the first exception, in subparagraph (a), where there was "no reasonable possibility of effective redress" and thought that the exception in subparagraph (b), where there was "undue delay in the remedial process" attributable to the State alleged to be responsible, was well established in human rights instruments, judicial decisions and legal writings.

9. The question of the protection accorded by the State of nationality of a ship to the members of its crew fell within the purview of the law of the sea. However, his delegation found the solution adopted by the Commission in draft article 19 acceptable, whereby the right of the State of nationality of the members of the crew to exercise diplomatic protection on their behalf was not affected by the right of the State of nationality of the ship to do the same.

10. The Commission had made commendable progress at its fifty-sixth session on the topic of international liability for injurious consequences arising out of acts not prohibited by international law by adopting the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities only three years after the adoption of the draft articles on prevention. Although limited in scope, the draft principles could serve as a useful guide to States and contribute to resolving questions of compensation. As to the final form they should take on second reading, his delegation would prefer a non-binding text, such as a declaration, guide or model law, and would present written comments on the issue in due course.

11. **Mr. Dinescu** (Romania) said that his delegation welcomed the 19 draft articles on diplomatic protection adopted by the Commission on first reading and found the commentaries clear and useful. Draft articles 17 and 18 might perhaps be merged, since the actions or procedures referred to in draft article 17 included those available under human rights treaties as well as investment treaties. Perhaps, too, there was no need for a special provision on ships' crews, as in draft article 19. Although his delegation shared the view that the right of the State of nationality of a ship's crew to exercise diplomatic protection on their behalf was different from and coexisted with the right of the flag State to seek redress for members of the crew irrespective of their nationality, it was inclined to believe that the situation was sufficiently covered by draft article 17. There was no need for the articles to recognize that right of the flag State explicitly, because it fell outside the scope of diplomatic protection.

12. Romania supported the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission on first reading. Based on a pragmatic approach, they offered the possibility of establishing an effective mechanism to ensure that victims received

compensation. His delegation was pleased with the broad scope of draft principle 2 and supported the inclusion of loss or damage by impairment of the environment in the definition of damage. Striking the right balance between economic growth and environmental protection was a current concern of many, and the issue was even more complex in a transboundary context. Romania, for example, was concerned about preservation of the natural habitat in the Danube delta in the light of efforts to build a navigable canal on the Bystroe and Chilia branches. With regard to the final form of the instrument to be adopted, his delegation shared the view that the text on liability should be combined in one instrument with the text on prevention. Although it did not exclude the possibility of a "soft law" approach, Romania would prefer the conclusion of a more effective instrument to ensure an adequate enforcement mechanism.

13. With regard to other decisions and conclusions of the Commission, his delegation fully endorsed the Commission's comments on the importance of summary records as an essential part of its work and of the Yearbook of the International Law Commission and its views on honoraria. It supported the inclusion in the current programme of work of the new topics "Expulsion of aliens" and "Effects of armed conflicts on treaties", but had doubts regarding the inclusion of the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" in the long-term programme of work. Although there was a developing practice of including the obligation in many international treaties, especially those relating to terrorism and crime, his delegation saw no immediate practical usefulness or relevance in the study of the principle. However, it could go along with the Commission's decision.

14. **Ms. Odaba-Mosoti** (Kenya), after commending the progress made on the topic of diplomatic protection during the Commission's fifty-sixth session, with the adoption on first reading of the draft articles, said that her Government would, after consulting the relevant agencies and experts, make written submissions to the Commission in due course. Meanwhile, it agreed with the general thrust of the draft articles. The principle that a State should be held accountable for injury caused to aliens by its wrongful acts or omissions, and the concomitant right of a State to exercise diplomatic protection in respect of its nationals, were long established in international law. The Commission's efforts to define the parameters within which the principle should operate, in order to avoid inconsistencies in its application by States, were therefore commendable.

15. The application of the nationality principle raised a number of difficult questions. For instance, in the case of dual or multiple nationality, the possibility of competing claims from different States directed at a third State in respect of the same person could not be ruled out. Although paragraph (4) of the commentary to draft article 6, discussed the possibility of joint claims, it failed to offer direction in respect of separate or successive claims. The matter deserved further attention; it should not be relegated to the realm of the general principles of law, since that would lead to the uneven application of standards. The Commission should undertake further work on elaborating rules to govern such situations. For example, the possibility of applying principles such as *res judicata* could be explored. Another possibility would be to establish an order of preference based on the dominant nationality principle.

16. With regard to the question of "nationality shopping", raised in the commentary to draft article 5, her delegation concurred with the Commission's view that the traditional continuous nationality rule should be retained to safeguard against nationality shopping. The exception contained in paragraph 2 of the draft article presented some difficulties, however. Since a State's right to exercise diplomatic protection derived from an injury to a national, it would be difficult to divorce the time of the injury from the time of the presentation of the claim. If an injured person changed nationalities in the intervening period, then clearly the new State of nationality had no *locus standi*, since it had had no duty to protect the injured person at the time of the injury. Moreover, the additional threshold requiring that there should be no nexus between the claim and the change of nationality was not easily enforceable, especially in cases of involuntary change of nationality. Her delegation would therefore favour the deletion of paragraph 2, leaving paragraph 3 as the only exception to the continuous nationality rule.

17. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, she said that, although still very broadly worded, the draft principles provided a solid basis for the development of an effective compensatory regime that would complement existing sectoral regimes in respect of transboundary harm.

18. The innocent victims of transboundary harm must be promptly and adequately compensated for damage to their persons or property or the environment. While supporting the thinking behind the draft principles, therefore, her delegation was nevertheless concerned about a number of points. First, given that the "polluter pays" principle and the "precautionary approach" elaborated in the Rio Declaration on Environment and Development and other environmental instruments were central to environmental damage compensatory regimes, the Commission should give greater emphasis to such principles in its future consideration of the topic. Secondly, the parameters of the obligation imposed on States under draft principle 4, paragraph 5, were not very clear. The Commission rightly imposed the primary responsibility on the operator. In her delegation's view, however, the State's responsibility should be limited to ensuring that operators within its jurisdiction complied with their obligations, especially with regard to establishing adequate compensation mechanisms. Paragraph 5 of the draft principle, obliging States to ensure the allocation of additional financial resources, went beyond the secondary duty of States to ensure compliance. The statement in paragraph (6) of the commentary that States were not obliged to set up government funds to supplement shortfalls by operators should, in the interests of clarity, be incorporated into paragraph 5.

19. *Mr. Simon (Hungary), Vice-Chairman, took the Chair.*

20. **Mr. Ayua** (Nigeria) said that the International Law Commission continued to play a pivotal role in furthering the codification and progressive development of international law, amplifying and cataloguing matters referred to it by the General Assembly as well as attending to matters of overall interest to Member States. It was one of the pillars upon which the United Nations system rested.

21. His Government was critically reviewing the draft articles on diplomatic protection and would submit written comments in due course. Meanwhile, it largely agreed with the Commission that a State should protect and obtain reparation for its nationals injured by the internationally wrongful act of another State, after all local remedies had been exhausted. It also supported draft article 8, which gave States the right to extend diplomatic protection to stateless persons and refugees under clearly stipulated conditions. As for injury to a corporation, the exercise of diplomatic protection should, as stated in the *Barcelona Traction* case, rest primarily with the State of incorporation. Foreign investments should, however, be adequately guaranteed, taking into consideration the concerns both of the corporate investor and the shareholders, regardless of their nationalities. In that context, Nigeria had put in place an investment regime to protect foreign investors, while ensuring the delivery of services, thus ensuring the stable development of the country's economy. The national institutions established to facilitate those objectives included the Nigerian Investment Promotion Commission, the Nigeria Export Promotion Council and the Nigeria Export Processing Zones Authority. Meanwhile, corruption had been addressed through the establishment of such bodies as the Independent Corrupt Practices and Other Related Offences Commission, the Economic and Financial Crimes Commission and the Due Process Mechanism.

22. With regard to the draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities, Nigeria lived with the painful memory of the dumping in 1988 of 40 to 50 tonnes of radioactive industrial waste in the port of Koko. The waste had afflicted the population and the environment, although it remained difficult to assess the full impact of the tragedy. The Government had had difficulty in dealing with the problem at the time, owing to the absence of an appropriate international legal instrument. It therefore commended the Commission's efforts to tackle the problem and the consistent attention paid to the challenges associated with the definition and interpretation of such terms as "prevention", "liability", "compensation" and "allocation of loss".

23. Remarkable progress had been made with completion of the first reading of the draft principles on the allocation of loss, although the Commission's work would be facilitated by a rigorous analysis of liability as understood under various regimes. A number of international and domestic instruments referred to "significant", "serious" or "substantial" damage as the threshold for giving rise to a legal claim, but the concept should be further examined. After all, what was not considered significant damage in one country could have enormously significant economic, social, political or security costs elsewhere. The need for a more elaborate, while concise, definition of significant damage could not be overemphasized.

24. His delega ion endorsed draft principle 7, which encouraged the development of specific international regimes covering the areas of prevention, response measures and compensation. Furthermore, studies to determine the extent to which recent environmental disasters had been the result of negligence or of violations of rules in those areas were urgently needed. The dumping of hazardous wastes constituted one of the most serious economic, social and security threats to the world, and particularly to the developing countries.

25. His delegation welcomed the two topics added to the Commission's programme of work, namely "Effects of armed conflicts on treaties" and "Expulsion of aliens", which were relevant and timely. With the increasing number of armed conflicts at the national and international levels, the interrelatedness of the two topics was clear. His delegation also noted with appreciation the Commission's continued cooperation with other bodies, including the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization and the European Committee on Legal Cooperation. Such collaborative efforts no doubt enriched the Commission's deliberations. The Geneva International Law Seminar, which offered an opportunity for young lawyers from all parts of the world to familiarize themselves with the Commission's work, was also commendable and he urged States to contribute additional funds in support of the project.

26. *Mr. Bennouna (Morocco) resumed the Chair.*

27. **Mr. Prandler** (Hungary) said that the Commission had enjoyed an extremely productive session, having completed the first reading of texts on two important and difficult topics, as well as making progress on others. The draft articles on the complex and sensitive topic of diplomatic protection would be scrutinized by the relevant Hungarian authorities and written comments would be submitted in due course.

28. With regard to the inclusion of two new topics in the Commission's programme of work, his delegation shared the concern expressed by others that the report did not convincingly explain the need for the additions. The topic "Expulsion of aliens", in particular, should rather be taken up by other institutions of the United Nations system, such as the United Nations High Commissioner for Refugees or the Commission on Human Rights.

29. His delegation noted with sympathy that the Commission regarded its summary records as the equivalent of *travaux préparatoires*. Paragraph 367 of the report, however, gave no details of the other possibilities proposed by the Secretariat and his delegation would welcome clarification.

30. With regard to the topic of international liability in the case of loss from transboundary harm arising out of hazardous activities, his delegation considered that the content of the eight draft principles represented a significant step forward. Draft principle 4, in particular, with its imposition of certain requirements on States, touched on the vital interests of his country. Owing to its geographical situation, Hungary was extremely vulnerable to transboundary harm. One egregious example had been the extensive cyanide pollution by a friendly neighbouring country of Hungary's second biggest river. Despite all efforts to negotiate an out-of-court settlement and the initiation of legal proceedings, not a penny of compensation had been received thus far by the victims, whether individuals or legal entities. He did not wish to overdramatize the situation, however. There had also been promising bilateral and multilateral cooperation with neighbouring countries.

31. While his delegation endorsed the basic content of the draft principles, it did not favour the term "principles", for two reasons. First, principles usually applied to general rules, but the term made little sense in relation to such provisions as the "Scope of application" or "Use of terms". Secondly, following the Commission's adoption in 2001 of a draft preamble and 19 draft articles on the topic, General Assembly resolution 56/82 had requested it to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability. The Commission should therefore not restrict itself to principles but should elaborate a set of draft articles on liability. Indeed, the Commission itself stated, in a footnote to paragraph 175 of the report, that it reserved the right to reconsider the final form of the instrument in the light of comments by Governments. His delegation was pleased to note that other delegations, including those of Austria, Greece, the Netherlands, New Zealand, Portugal and Slovenia, had expressed similar reservations about the use of the word "principles".

The meeting rose at 3.55 p.m.